Muhammad Solihin bin Abdul Rahman v Public Prosecutor

HIGH COURT (KOTA BHARU) — CRIMINAL APPEAL NO 42S-20–4 OF 2017
AHMAD BACHE J
20 MAY 2018

Criminal Law — Appeal — Appeal against sentence — Appellant sentenced to five years imprisonment by trial court — Appellant appealed against decision of trial court — Whether the word 'shall be liable' meant mandatory punishment — Whether punishment of imprisonment imposed by trial court harsh — Whether appellant entitled to bond of good behavior — Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6(1) — Criminal Procedure Code s 294

The appellant was charged at the court below for having in his possession in a public place, a dangerous weapon, that was a knife, without lawful excuse or authority, an offence under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('the Act'). The appellant was convicted after a full trial. He was sentenced to five years imprisonment from the date of the sentence on 30 Mac 2017. Dissatisfied with the punishment given by the trial court, the appellant filed an appeal on sentence to the present court. The appellant contended that the punishment of five years imprisonment was too harsh and instead, the appellant should be awarded bond of good behavior under s 294 of the Criminal Procedure Code. The respondent, on the other hand, contended that the five years' imprisonment imposed to the appellant was reasonable as the offence was a serious offence in nature and hence the heavier punishment needed to be imposed as the public interest must prevail over the appellant's interest.

Held, allowing the appellant's appeal and setting aside the order of sessions court judge:

(1) It ought to be noted that s 6(1) of the Act was quite recently amended which amendment came into force effective on 2 July 2014. Prior to that amendment, offenders were charged only in the magistrates courts and it was not uncommon for offenders to be given a one day imprisonment or a bound over only as the maximum sentence allowed then was an imprisonment not exceeding two years and to whipping. The amended provision of s 6 of the Act worded 'shall be liable' was similar to the previous provision. The terms 'shall be punished' and 'be liable to be punished' were subjected to much judicial discussions. The Court of Appeal in the case of *Public Prosecutor v Hassan Ali* had decided that the

amended provision meant a mandatory five years minimum imprisonment with a maximum of ten years imprisonment (see paras 10 & 12–13).

(2) It was clear that the intention of the Parliament was to enable a person convicted under s 6 of the Act to be permitted to be released on bond for good behavior, according to the satisfaction of the court. The amendment was to curb the rising number of organised serious crimes such as using firearms and dangerous weapons in robbery, murder, extortion, gangland fights although such elements were not borne out from the facts of the present case. The order of bound over did not at all exonerate an accused person of the offence committed as he was still convicted but only that the sentence was suspended and the conviction recorded and will form part of his criminal record. Hence it was not uncommon for courts in Malaysia including the Court of Appeal, depending on the facts and circumstances of each case to give an order of bound over for this offence. The court found that the sentence of five years imprisonment was too harsh and crushing in the circumstances of the case (see paras 15–19).

(3) The court was of the considered opinion that against the backdrop of the reasons behind the amendment of this provision and that the appellant did not fall in any of those categories of criminals as alluded to earlier and the fact that he had gone through a series of imprisonment including remand by the time of the present appeal, the appellant had learnt enough of what was like to be in prison and had since repented. The learned judge did not give significant consideration on those factors which warranted appellate intervention. The accused should be given a bound over and be released under a bond of good behavior for five years of RM5,000 in one surety (see paras 25–27).

[Bahasa Malaysia summary

Perayu dituduh di mahkamah bawahan kerana memiliki di tempat awam, senjata berbahaya, iaitu pisau, tanpa alasan atau kuasa yang sah, suatu kesalahan di bawah s 6(1) Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 ('Akta'). Perayu telah disabitkan selepas perbicaraan penuh. Dia dijatuhi hukuman lima tahun penjara dari tarikh hukuman pada 30 Mac 2017. Tidak berpuas hati dengan hukuman yang diberikan oleh mahkamah perbicaraan, perayu memfailkan rayuan terhadap hukuman kepada mahkamah ini. Perayu berpendapat bahawa hukuman lima tahun penjara terlalu berat dan sebaliknya, perayu patut diberikan jaminan berkelakuan baik di bawah s 294 Kanun Tatacara Jenayah. Sebaliknya, responden berpendapat bahawa hukuman penjara lima tahun yang dikenakan kepada perayu adalah munasabah kerana kesalahan itu adalah kesalahan serius dan oleh itu hukuman yang lebih berat perlu dikenakan kerana kepentingan awam mesti mengatasi kepentingan perayu.

Diputuskan, membenarkan rayuan perayu dan mengetepikan perintah hakim mahkamah sesyen:

(1) Perlu diingat bahawa s 6(1) Akta baru-baru ini dipinda yang pindaan berkuatkuasa pada 2 Julai 2014. Sebelum pindaan itu, pesalah hanya didakwa di mahkamah majistret dan ia bukan perkara tidak biasa bagi pesalah untuk diberikan penjara satu hari atau hanya terikat kerana hukuman maksimum yang dibenarkan pada masa itu adalah penjara tidak melebihi dua tahun dan sebatan. Peruntukan pindaan s 6 Akta yang bertuliskan 'bertanggjawab' adalah serupa dengan peruntukan yang terdahulu. Istilah 'akan dihukum' dan 'boleh dikenakan hukuman' tertakluk kepada banyak perbincangan kehakiman. Mahkamah Rayuan dalam kes *Public Prosecutor v Hassan Ali* telah memutuskan bahawa peruntukan yang dipinda itu bermakna mandatori minimum lima tahun penjara dengan maksimum sepuluh tahun penjara (lihat perenggan 10 & 12–13).

(2) Adalah jelas bahawa maksud Parlimen adalah untuk membolehkan seseorang yang disabitkan di bawah s 6 Akta bagi dibenarkan untuk dilepaskan dengan jaminan berkelakuan baik, mengikut kepuasan mahkamah. Pindaan itu adalah untuk membendung jumlah jenayah serius yang terancang seperti menggunakan senjata api dan senjata berbahaya dalam rompakan, pembunuhan, peras ugut, pergaduhan mafia walaupun unsur-unsur tersebut tidak dibuktikan daripada fakta kes tersebut. Perintah terikat tidak sama sekali melepaskan orang yang dituduh melakukan kesalahan itu kerana dia masih disabitkan tetapi hanya hukuman itu digantung dan sabitan itu direkod dan akan menjadi sebahagian daripada rekod jenayahnya. Oleh itu, ia bukan perkara biasa bagi mahkamah di Malaysia termasuk Mahkamah Rayuan, bergantung kepada fakta dan keadaan setiap kes untuk memberikan perintah terikat untuk kesalahan ini. Mahkamah mendapati bahawa hukuman lima tahun penjara terlalu berat dan menghancurkan dalam keadaan kes itu (lihat perenggan 15–19).

(3) Mahkamah berpendapat bahawa terhadap sebab-sebab di sebalik pindaan peruntukan ini dan perayu tidak termasuk dalam mana-mana kategori penjenayah sebagaimana yang disebutkan sebelumnya dan hakikat bahawa dia telah melalui suatu siri penjara termasuk reman pada masa rayuan sekarang, perayu telah mengetahui tentang keadaan berada di penjara dan sejak itu menyesal. Hakim yang bijaksana tidak memberikan pertimbangan yang nyata terhadap faktor-faktor yang membenarkan campur tangan rayuan. Tertuduh harus diberikan ikatan dan dibebaskan di bawah jaminan berkelakuan baik untuk lima tahun dengan RM5,000 dalam satu penjamin (lihat perenggan 25–27).]

Notes

For cases on appeal against sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 102–110.

Cases referred to

Goh Kheng Seong v PP [1993] 1 MLJ 103, HC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Kamarusham bin Zakaria v PP [2017] MLJU 1208; [2018] 2 CLJ 328, HC (refd)
Mahrus v PP [1992] 1 MLJ 561, HC (refd)
Nor Afizal bin Azizan v PP [2012] 6 MLJ 171; [2012] 6 CLJ 370, CA (refd)
PP v Hassan Ali a/l Abdul Razak [2016] 12 MLJ 283; [2016] 9 CLJ 584, HC (refd)
PP v Hassan Ali (unreported), CA (refd)
PP v Leonard Glenn Francis [1989] 2 MLJ 158, HC (refd)
PP v Man bin Ismail [1939] 1 MLJ 207 (refd)
PP v Nordin bin Yusmadi [1996] MLJU 184; [1996] 2 CLJ 90, HC (refd)
PP v Wahab [1964] 1 MLJ 265 (refd)
PP v Wan Hasrul Nizam bin Wan Hizamuddin [2017] 10 MLJ 68; [2017] 4 CLJ 389, HC (refd)
Tukiran bin Taib v PP [1955] MLJ 24 (refd)

Legislation referred to

Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6, 6(1)
Criminal Procedure Code ss 294, 294(1)

Cheah Poh Loon (PL Cheah & Co) for the appellant.
Shaharaliza bt Ab Razak (Deputy Public Prosecutor, Kelantan Legal Advisor's Office) for the respondent.

Ahmad Bache J:

BACKGROUND

[1] The accused/appellant was charged at the court below for having in his possession in a public place, a dangerous weapon, that was a knife, without lawful excuse or authority, an offence under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (Act 357) punishable under the same section.

[2] The accused/appellant was convicted after a full trial. He was sentenced to five years imprisonment from the date of the sentence on 30 March 2017.

[3] Dissatisfied, the accused/appellant filed an appeal on sentence to this court.

[4] After hearing submissions by both parties, this court allowed the appeal on sentence whereby the accused was released under a bond of good behaviour for five years in one surety of RM5,000 under s 294 of the Criminal Procedure Code.

[5] Dissatisfied with the decision of this court, the public prosecutor filed an appeal in respect of the inadequacy of sentence to the Court of Appeal.

[6] Herewith are the grounds for that decision regarding sentence only.

THE CHARGE

[7] The charge preferred against the accused was as follows:

> Bahawa kamu pada 18/4/2015 jam lebih kurang 06.00 pagi di hadapan CIMB Bank Bandar Baru Kubang Kerian, Jalan Sultanah Zainab II, Kota Bharu, di dalam Negeri Kelantan telah didapati dalam milik kamu satu senjata berbahaya iaitu sebilah pisau berhulu kayu sepanjang 10 cm yang dibalut dengan kain jeans warna biru di dalam poket seluar bahagian hadapan tanpa maksud yang sah. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 6(1) Akta Kakisan dan Letupan dan Senjata Berbahaya 1958.

THE FACTS OF THE CASE

[8] The facts of the prosecution's case can be gleaned from the finding of the trial judge at p 15 of *Jld* 1 of the appeal record which are reproduced below:

> Keterangan pihak pendakwaan ialah pada 18.4.2015, jam lebih kurang 6.00 pagi, semasa SP1, SP2 bersama dengan 2 orang anggota polls yang lain semasa bertugas membuat rondaan cegah jenayah telah tiba di hadapan CIMB Bandar Baru Kubang Kerian. SP1 telah nampak 2 orang lelaki Melayu dalam keadaan mencurigakan iaitu berlegar-legar di hadapan CIMB bank dengan menaiki sebuah motorsikal bernombor pendaftaran WRW 3046. SP1 telah memperkenalkan diri sebagai anggota polis dan tiba-tiba 2 orang lelaki tersebut bertindak melarikan diri. Semasa cubaan melarikan diri motorsikal telah terjatuh. SP1 , SP2 dan anggota polls yang lain telah mengejar kedua-dua lelaki tersebut dan berlaku pergelutan sebelum kedua lelaki tersebut dapat ditangkap. Tangkapan dibuat di lorong belakang bank. Semasa pemeriksaan dilakukan ke atas lelaki yang dicamkan sebagai OKT, SP1 telah menjumpai sebilah pisau berhulu kayu warna coklat (P3) yang mempunyai kepanjangan 10 cm dari hulu hingga ke hujung dibalut dengan kain jeans warna biru (P4) di dalam poket hadapan sebeiah kanan seluar jeans jenama G Star berwarna biru gelap (P2) yang dipakai oleh OKT. SP2 ada bersama SPJ ketika pemeriksaan tersebut. SP1 telah membawa OKT dan seorang lagi lelaki yang ditahan iaitu Ashfizul bin Zakri bersama dengan barang-barang kes ke Balai Polis

dan menyerahkannya kepada Pegawai Penyiasat (SP3), SP1 telah membuat laporan polis (P5).

FINDINGS OF THE SESSION'S JUDGE ON SENTENCE

[9] The learned judge made a brief ground on his finding regarding sentence at p 28 of the appeal record where he said:

> Mahkamah telah meneliti dan mempertimbangkan faktor-faktor rayuan yang dikemukakan oleh peguambela OKT dan hujahan pemberatan hukuman oleh pihak pendakwaan. Mahkamah berpendapat selain dari menimbangkan faktor-faktor rayuan berkenaan kepentingan OKT iaitu kesalahan pertama, keinsafan, menjaga ibu yang tua dan sakit serta mempunyai masa depan yang cerah, Mahkamah juga hendaklah menimbangkan faktor kepentingan awam. Kesalahan di bawah seksyen 6(1) Akta Bahan Kakisan Letupan Dan Senjata Berbahaya 1958 ini adalah satu kesalahan yang serius. lni dapat digambarkan oleh hukuman penjara tidak kurang dari 5 tahun dan tidak lebih dari 10 tahun serta boleh dikenakan sebatan. Kes membawa senjata berbahaya di tempat awam berleluasa sekarang. lanya boleh mendatangkan bahaya kepada orang awam. Mahkamah berpendapat faktor kepentingan awam melebihi dari faktor kepentingan OKT. Kes ini telah selesal secara perbicaraan dan bukannya secara pengakuan salah. lni berbeza dengan kes yang dirujuk oleh peguambela OKT.
>
> Hukuman yang wajar dijatuhkan adalah hukuman yang dapat memberikan pengajaran kepada OKT dan orang lain agar tidak melakukan kesalahan tersebut lagi.

ANALYSIS AND FINDINGS OF THIS COURT

[10] It is to be noted that this section (s 6) was quite recently amended which amendment came into force effective 2 July 2014. Prior to that amendment, offenders were charged only in the magistrates courts and it was not uncommon for offenders to be given a one day imprisonment or a bound over only as the maximum sentence allowed then was an imprisonment not exceeding two years and to whipping.

[11] To appreciate the old and the new amended provision, this court found it germane to distinguish them:

The previous provision reads:

> 6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction *be liable to imprisonment for a term not exceeding two years*, and to whipping.

Whereas the amended provision reads:

A

> 6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction *be liable to imprisonment for a term of not less than five years and not more than ten years*, and to whipping.

B

[12] The amended provision, is worded 'shall be liable', similar to the previous provision. The terms 'shall be punished' and 'be liable to be punished' were subjected to much judicial discussions (see *Public Prosecutor v Wahab* [1964] 1 MLJ 265; *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68; *Mahrus v Public Prosecutor* [1992] 1 MLJ 561; *Goh Kheng Seong v Public Prosecutor* [1993] 1 MLJ 103; *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207; *Public Prosecutor v Nordin bin Yusmadi* [1996] MLJU 184; [1996] 2 CLJ 90; and *Public Prosecutor v Leonard Glenn Francis* [1989] 2 MLJ 158).

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D

[13] However the Court of Appeal in the case of *Public Prosecutor v Hassan Ali* (unreported) had decided that the amended provision carries a meaning of mandatory five years minimum imprisonment with a maximum of ten years imprisonment.

E

[14] That begs the next question as to whether by virtue of the amended provision, can a bound over or bond of good behavior under s 294 of the Criminal Procedure Code be imposed?

F

[15] This court had occasion to analyse on this matter in the case of *Kamarusham bin Zakaria v Public Prosecutor* [2017] MLJU 1208; [2018] 2 CLJ 328 where this court had referred to the *Hansard* and said at pp 333–334 (CLJ).

> At p 81 of the *Hansard* dated 10 April 2014 it is stated:
>
> > Pertama, Yang Berhormat menyebut persoalan hukuman yang kita letak di sini sebagai mempunyai minimum sentence dan tidak boleh dihukum kurang daripada itu dan maksimumnya memang kita tahu. Semua yang mempunyai latihan sebagai peguam Yang Berhormat, bila melihat perkara ini berlaku kita berasa bimbang kerana tidak ada memberi laluan budi bicara kepada pihak hakim semasa menjalankan kes itu di mahkamah. Akan tetapi biarlah saya mula dengan sedikit mukadimah.
>
> Sebenarnya walaupun dalam undang-undang ini mengatakan bahawa minimum sentence itu berapa tahun dan maksimumnya berapa tahun. *Maknanya kalau dia didapati bersalah di bawah undang-undang ini, hukuman yang bakal hakim beri kepada dia ialah minimum* tetapi dalam masa yang sama Tuan Pengerusi, kuasa mahkamah dalam mengenakan hukuman kepada pesalah, dalam sudut lain tidak pernah diambil. *Umpamanya di bawah seksyen 294 Kanun Tatacara Jenayah yang mana mahkamah boleh memberi bon berkelakuan baik, sama tempoh yang ditetapkan oleh mahkamah.* (Penekanan ditambah.)

G

H

I

Hence, it is patently clear that the intention of the Parliament is to enable a person convicted under this provision to be permitted to be released on bond for good behavior, according to the satisfaction of the court. This was also affirmed in the case of *Public Prosecutor v Hassan Ali*, where the Court of Appeal had affirmed the order of bound over under s 294 CPC handed down by the High Court.

Back to the instant case, this court would like to reiterate that the amendment was to curb the rising number of organised serious crimes such as using firearms and dangerous weapons in robbery, murder, extortion, gangland fights etc. although such elements were not borne out from the facts of this case.

[16] This court would like to impress upon parties that the order of bound over did not at all exonerate an accused person of the offence committed as he was still convicted but only that the sentence was suspended and the conviction recorded and will form part of his criminal record (see *Kamarusham Zakaria, Nor Afizal bin Azizan v Public Prosecutor* [2012] 6 MLJ 171; [2012] 6 CLJ 370).

[17] Hence it is not uncommon for courts in Malaysia including the Court of Appeal, depending on the facts and circumstances of each case to give an order of bound over for this offence. As an example, in the case of *Public Prosecutor v Hassan Ali a/l Abdul Razak* [2016] 12 MLJ 283; [2016] 9 CLJ 584*, the High Court gave an order of bound over under* s 294 of the CPC and was affirmed by the Court of Appeal. Likewise in the case of *Public Prosecutor v Wan Hasrul Nizam bin Wan Hizamuddin* [2017] 10 MLJ 68; [2017] 4 CLJ 389*, the sessions court ordered a bound over under* s 294(1) of the CPC. On appeal by the public prosecutor, the High Court dismissed the appeal and affirmed the order of bound over.

[18] From the line of authorities adverted to earlier, a bound over order seems to be the trend of sentencing adopted by the courts, depending on the facts and circumstances of each case.

[19] Back to the instant case, the accused was sentenced to five years imprisonment. This court had perused the grounds of judgment of the learned sessions judge and found it germane to interfere. This court found on analysis, the sentence of five years imprisonment was too harsh and crushing in the circumstances of the case.

[20] The amendment to the provision as alluded to earlier was to curb the increasing number of serious organised crime, such as gang robbery, use of firearms, gang fight, gangland murder etc, as mentioned in the *Hansard*.

[21] This court had occasion to describe the scenario if at all the weapon/s were meant for such organised crime in the case of *Kamarusham* thus:

> There were no such scenario as samurai swords found in the boot of the car he was assumed driving with few others inside, which could signify that he and the rest had just come back from a gang fight; or a blood stained parang, or long knife found on him, which could all be inferred that the accused had stabbed someone after a fight or a robbery etc.

[22] Reverting back to the case at hand, there were also no such scenarios as described above. The accused was merely found having in his possession of the said weapon as described in the charge sheet in his front pocket of his trousers whilst standing in front of the CIMB bank. There wasn't any proof that earlier, he was involved in a gang fight. Neither was there any proof of there was a brawl or a robbery earlier and the weapon was used and it was still blood stained.

[23] Further, the accused/appellant was only 24 years of age at the time this offence was committed. As quite a young person, some consideration should be given, (see *Tukiran bin Taib v Public Prosecutor* [1955] MLJ 24) as being imprisoned or too long in prison will do more harm than good, as he would become a hardened criminal as he would be exposed to many criminals such as rapists, robbers, drug traffickers and the likes in the prison. Hence he should be given the opportunity to spare the prison sentence and to mend himself and thereafter turn over a new leaf. This court found that he has the potential to be a good citizen as most of his siblings are teachers and businessmen who would be in good positions to monitor his activities. Further, public interest which was of paramount importance itself warrants that the sentence to be imposed on this type of criminal should be one that could induce him to turn from a criminal to an honest life. In the words of Hashim Yeop Sani, High Court Judge Malaya as he then was in the case of *Loo Choo Fatt* who said:

> The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[24] Further the accused/appellant was a first offender. He has no criminal record. He was also remorseful and had also repented. The accused/appellant is also taking care of her aged mother as his father had died at the age of 70 in 2016.

[25] Finally the court was of the considered opinion that against the backdrop of the reasons behind the amendment of this provision and that the accused/appellant did not fall in any of those categories of criminals as alluded to earlier and the fact that he had gone through a series of imprisonment (including remand) by the time this appeal reached this court, the accused/appellant had learnt enough of what was like to be in prison and had since repented. This was clearly borne out from the submissions of the learned counsel, both at the court below and before this court.

[26] Unfortunately whilst public interest supercede personal interest of the accused/appellant the learned judge did not give significant consideration on those factors which warranted appellate intervention.

CONCLUSION

[27] For the aforesaid reasons, this court found that in the circumstances of the case, the accused should be given a bound over and be released under a bond of good behaviour for five years of RM5,000 in one surety under s 294 of the Criminal Procedure Code. In the upshot, the appeal by the accused/appellant was allowed and the order of the session's judge was accordingly set aside.

Order accordingly.

Appellant's appeal allowed and order of sessions court judge set aside

Reported by Mohd Kamarul Anwar